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property of one not a party to the contract, occurring after he has completed and turned it over to the owner or employer and it has been accepted by him.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 68; Dec. Dig. § 55.\* 7 Va.-W. Va. Enc. Dig. 363, et seq.; 10 Id. 363.]

**8. Negligence (§ 121\*)—Presumption from Injury.**—While negligence is never presumed from the mere fact of injury, yet where defendant owes to plaintiff a duty to use care, and the thing causing the injury was under the management of defendant or his employees, and the accident is such as ordinarily does not occur when proper care is taken, a presumption of negligence is warranted.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 218; Dec. Dig. § 121.\* 10 Va.-W. Va. Enc. Dig. 402-5, et seq.]

**9. Municipal Corporations (§ 817\*)—Falling Awning—Injury to Pedestrian—Presumption of Negligence—Burden of Proof.**—Where a pedestrian on a highway is injured by the fall of an awning attached to a building, and it is not claimed to be a nuisance, the injury warrants the presumption of negligence, which puts the burden on defendant to disprove it by evidence of employment of proper and reasonable care.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1725; Dec. Dig. § 817.\* 10 Va.-W. Va. Enc. Dig. 403, et seq.]

**10. Appeal and Error (§ 1004\*)—Excessive Damages—Questions for Jury.**—Unless the damages allowed for a negligent injury are so large as to indicate that the jury was actuated by partiality or prejudice, the verdict cannot be set aside as excessive.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3944-3947; Dec. Dig. § 1004.\* 4 Va.-W. Va. Enc. Dig. 202, et seq.]

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METROPOLITAN LIFE INS. CO. *v.* DE VAULT'S ADM'X.

March 11, 1909.

[63 S. E. 982.]

**1. Insurance (§ 648\*)—Action—Burden of Proof—Misrepresentation.**—In an action on a policy of life insurance, the burden is on defendant to show the materiality and fraudulent intent of misrepresentations relied on to avoid the policy.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1653; Dec. Dig. § 646.\* 7 Va.-W. Va. Enc. Dig. 801; 9 Id. 351.]

**2. Insurance (§ 665\*)—Actions—Weight of Evidence—Suicide.**—To establish the defense of suicide to avoid a life policy, the evidence where circumstantial must exclude every hypothesis of accidental death.

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\*For other cases see same topic and section NUMBER in Dec. and Am. Digs. 1907 to date, and Reporter Indexes.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1720; Dec. Dig. § 665.\*]

**3. Insurance (§ 646\*)—Action—Burden of Proof—Suicide.**—In an action on a life policy, the burden of proving that insured died by suicide was on defendant.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1663; Dec. Dig. § 646.\*]

**4. Insurance (§ 665\*)—Actions—Sufficiency of Evidence.**—In an action on a life policy, evidence held to sustain a finding that insured's death was accidental, and not by suicide.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1720; Dec. Dig. § 665.\*]

**5. Trial (§ 140\*)—Questions for Jury—Credibility of Witnesses.**—The jury are the sole judges of the credibility of the witnesses and the weight of their testimony.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 334; Dec. Dig. § 140.\* 5 Va.-W. Va. Enc. Dig. 354; 13 Id. 974.]

**6. Trial (§ 139\*)—Question for Jury—Weight of Evidence.**—The jury are the sole judges of the weight of the evidence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 338, 339; Dec. Dig. § 139.\* 5 Va.-W. Va. Enc. Dig. 351, et seq.]

**7. Insurance (§ 665\*)—Actions—Sufficiency of Evidence—Misrepresentations.**—In an action on a life policy, where the defense was misrepresentations as to the use of intoxicants, evidence held to sustain a finding that insured had never drank intoxicants to excess when he made the application.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1713; Dec. Dig. § 665.\* 9 Va.-W. Va. Enc. Dig. 351, et seq.]

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NORFOLK & W. RY. CO. v. BRAME.

March 11, 1909.

[63 S. E. 1018.]

**1. Appeal and Error (§ 1057\*)—Review—Harmless Error—Exclusion of Evidence.**—In an action for assault of a passenger by a brakeman, the error, if any, in excluding evidence of plaintiff's intoxication before and at the time he boarded the train, is harmless, where it was fully shown by other evidence that he was intoxicated and so disorderly in conduct as to justify his removal from the train.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4194-4199, 4205; Dec. Dig. § 1057.\* 1 Va.-W. Va. Enc. Dig. 592, et seq.]

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\*For other cases see same topic and section NUMBER in Dec. and Am. Digs. 1907 to date, and Reporter Indexes.